



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Teledyne Inet
File: B-228457.2
Date: February 22, 1988

DIGEST

1. Protest that agency failed to conduct meaningful discussions with offeror is denied where, during two rounds of written and oral discussions, agency informed protester of certain inconsistencies in its pricing proposals and protester was given an opportunity to revise its proposals in response to these concerns.
2. General Accounting Office denies protest that second best and final offer was mis-evaluated as to price in that contracting agency added to the price of hardware items that for data items when it allegedly knew, or should have known, that the price of data already was included within the hardware price. There was no indication in protester's revised final cost offer that the line item prices included the price for certain subline items. Contracting officer properly evaluated final offer, as revised following discussions, without regard to any pricing pattern that may have been established in the interim offers.
3. Protest concerning alleged improprieties apparent on the face of the solicitation is untimely when the protest is not filed until after contract award.

DECISION

Teledyne Inet protests the award of a contract to UMC Electronics Company under request for proposals (RFP) No. N00140-86-R-1918, issued by the Naval Regional Contracting Center (NRCC) in Philadelphia. The protester has raised a number of grounds for protest in its initial submission and in its comments on the agency report: that as the low responsive offeror it was prejudiced by the agency's failure to conduct meaningful discussions with the firm; that the agency failed to request verification in light of a suspected mistake in its price proposal; that it was further

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prejudiced by the unequal treatment of offerors regarding the pricing of certain line items and this unequal treatment resulted in an improper evaluation of the firm's proposal; and that the solicitation failed to define the method of determining the total price of an offer for purposes of award.

All these contentions are but different legal approaches to the fundamental allegation in this case: that the protester's proposal for the supply of hardware and data items included the price of the data within that of the hardware, and that by totaling the prices of all those items the agency double-counted the price for data resulting in a mistaken price evaluation absent which the protester would have been the low, technically acceptable offeror.

We deny the protest in part and dismiss it in part.

On May 30, 1986, the NRCC issued the solicitation requesting proposals for 18 mobile frequency converters (hardware) and numerous subline items of technical data associated with the hardware. The solicitation contemplated a single award of a firm-fixed-price contract for these items and included an option quantity with technical data which were to be evaluated for purposes of award. At issue in this protest is the evaluation of Teledyne's second best and final offer (BAFO) on a frequency converter of rotary design.

The record indicates that prior to receipt of initial proposals, six amendments to the RFP were issued and, on October 28, the NRCC had received proposals from four firms, including Teledyne and UMC. In response to the RFP, Teledyne submitted two proposals: one based on a static frequency converter, and the other an unpriced technical proposal based on a rotary design converter which the firm concedes was not "fully compliant" with the specifications. The agency reports that only Teledyne's proposal on the static frequency converter was evaluated along with the proposals received from three other firms.

Discussions, both written and oral, were then conducted, and the NRCC requested BAFOs from all four firms. In requesting BAFOs, the agency forwarded amendment No. 007, which changed various paragraphs throughout the solicitation and included a revised Section B on which offerors were required to insert unit and extended prices for various subline items. Section B was the RFP's pricing schedule which included the basic and option quantities of the hardware and data items. In requesting a BAFO from Teledyne, by letter dated March 9, 1987, NRCC specifically commented on various aspects of the protester's technical and logistics submissions and formally notified the firm that its unpriced alternate proposal based

on the rotary design was not evaluated because the alternate design did not meet the requirements of the specifications.

Following evaluation of the BAFOs received, the NRCC determined that Bogue Electric's proposal was the lowest in price at \$4,358,275. However, the firm was determined to be nonresponsible and the Small Business Administration declined to issue a certificate of competency. UMC was next in line with an offer of \$4,973,983. The BAFO on the static frequency converter submitted by Teledyne was the highest priced at \$7,513,732. The agency states that Teledyne also submitted a BAFO on the rotary design converter and, in reviewing this BAFO submission, the NRCC negotiator found that the protester had only furnished every other page of the solicitation. Because of this, the negotiator contacted the protester to obtain a complete copy of the BAFO on the rotary design converter. By letter dated September 10, Teledyne furnished a complete BAFO on its rotary design converter to the contracting officer. The rotary design proposal was evaluated and found to be technically acceptable and the negotiator thereafter undertook an evaluation of the offered prices.

According to the NRCC, the negotiator discovered several inconsistencies in extensions of the firm's unit prices. Specifically, the agency reports that subline item 0002AJ had no unit price but had an extended price of \$9,837 for 18 units. Subline item 0004AB had a unit price of \$12,605 and an extended price of \$12,605 for 17 units. Additionally, line item 0003 had a unit price of \$82,420 and an extended price of \$140,114 for 17 units. The agency further reports that similar discrepancies for subline items 0002AJ and 0004AB were discovered in Teledyne's BAFO on the static frequency converter.

The negotiator concluded that a mistake may have been made by Teledyne and on September 11 she advised the firm of the various inconsistencies in its BAFO on the rotary design. In response to these discussions, Teledyne submitted corrected pages to its BAFO on September 14. According to the agency, the inconsistencies identified in Teledyne's BAFO on the static frequency converter were not raised in this telephone conversation because any award to Teledyne would be based on its offer for the rotary design -- the lower priced of the two BAFOs received from the firm.

Upon closer examination of Teledyne's BAFOs, other inconsistencies were discovered. The transmittal letter of April 3 accompanying the two BAFOs contained a cost summary which stated, in part:

"2. Motor Generator (Rotary) Frequency Converter

1. Qualification Testing: \$446,033*
2. Data (Clin 2) (0002AA thru 00022B) \$479,887*
3. Non Recurring Engineering \$559,354*
4. Production:

(Clin 0001) Mobile Frequency Converter

Unit Price \$164,935 18 ea. \$2,968,830

*Cost Included in Unit Price."

Section B of Teledyne's two BAFOs, however, listed prices for most technical data subline items separately and contained no indication that these technical data subline items were included in the hardware unit price. Further, the agency realized that Teledyne had taken exception to the data rights clause of the solicitation.

In view of the uncertainty surrounding Teledyne's price proposal and the exception taken to a mandatory provision of the solicitation, the NRCC decided to conduct a second round of discussions followed by a second request of BAFOs from all offerors in the competitive range. In the course of these discussions, Teledyne was advised that its exception to the data rights clause was unacceptable. The firm was also specifically advised that:

"In both of your proposals, there appears to be a conflict between the prices as cited on your page two and the prices listed within Section B. Please be advised, that the only prices which will be considered will be the prices listed within Section B of your revised best and final offer. Furthermore, your firm is advised that in the event of a discrepancy between unit price and extended amount, the unit price will govern."

A second round of BAFOs were received from Teledyne and UMC, the only offerors remaining in the competitive range. By letter dated September 22, Teledyne submitted its BAFOs and indicated that the firm had withdrawn its exception to the data rights clause and further indicated that:

"Unit prices have been examined and were revised for data items as required to resolve

inconsistencies between cost summary data and Schedule B of the Solicitation."

The NRCC determined that Teledyne's offers conformed to the technical specifications of the RFP and that only the BAFO on the rotary design converter would be considered for award since it was the lower priced of the two offers received from the protester.

After final evaluation of the second BAFOs from UMC and Teledyne, award was made to UMC, as the lowest priced offeror, in the amount of \$3,302,090 on September 29. Teledyne's protest to this Office was filed on October 9.

In its initial submission, Teledyne alleged that: (1) the NRCC violated the requirements of Federal Acquisition Regulation (FAR) § 15.610, which requires contracting officers to conduct meaningful discussions with all offerors in the competitive range; (2) that the contracting officer failed to advise the firm that a mistake in its proposal was suspected and concomitantly, failed to request verification as required by FAR § 15.607(c)(1); and (3) that evaluation of the firm's second BAFO on the rotary design converter was improper since the contracting officer evaluated UMC's and Teledyne's BAFO submissions on two different bases, to its prejudice.

Teledyne's allegation that meaningful discussions were not held centers upon the contracting officer's request for second BAFOs. The protester argues that, during discussions leading to the agency's second request for final offers, the NRCC did not point out or otherwise give notice to Teledyne that it suspected a mistake in the firm's method of pricing its technical data and hardware costs. The protester contends that the language used by the contracting officer in his September 16 letter -- that a "conflict" existed between the prices listed on page 2 of Teledyne's proposal and Section B of the solicitation -- was not "reasonably calculated" to alert the firm that its method of pricing required amplification or clarification. Teledyne believes that it should have been warned that the total price for the technical data subline items would be added to the total price for the hardware; or at least, that the NRCC suspected that there was a "double charge" included in Teledyne's first BAFOs for the technical data items.

In reply, NRCC argues that it conducted extensive discussions with Teledyne, both oral and written, regarding the inconsistencies in the pricing of technical data subline items. According to the NRCC, per affidavit of the contract negotiator, she communicated her concerns on this specific issue to representatives of the firm during telephone

conversations on September 15 and 16, respectively. In her affidavit, the negotiator states that she voiced her concern that:

". . . page 2 of [Teledyne's] cover letter suggests that data is included in the unit price of the hardware while Section B shows separate prices for the data. I said if the technical data is included in the unit price for hardware in Section B, why are prices for technical data also set forth in Section B."

The agency reports that on September 17 and 18, respectively, the negotiator was told by representatives of Teledyne, that the "problem with Section B" would be "taken care of." NRCC further states that it reiterated this concern in its September 16 letter to Teledyne. Thus, in its view, Teledyne was on notice of the agency's concern in this regard and should have understood that it needed to clarify or revise its proposal.

As Teledyne correctly points out, agencies are required to conduct oral or written discussions with all responsible offerors in the competitive range, advising them of deficiencies in their proposal so that they have an opportunity to satisfy the government's requirements. See FAR § 15.610; Northwest Regional Education Laboratory, B-222591.3, Jan. 21, 1987, 87-1 CPD ¶ 74 at 5. However, the requirement for meaningful written or oral discussions does not mean that offerors are entitled to all-encompassing discussions; rather, agencies are only required to lead offerors into areas of their proposals requiring clarification. Aydin Corp., B-227817, Sept. 28, 1987, 87-2 CPD ¶ 306 at 7.

In this case, we find that the NRCC met its obligation to conduct meaningful discussions with Teledyne. While Teledyne faults the contracting officer for not using "words that [would] command respect, fear, and secure immediate attention," we think Teledyne's expectation that the agency should provide an all-encompassing line by line narrative of the pricing inconsistencies, is unreasonable. Once the agency informed Teledyne, regardless of its choice of words, that its pricing of the technical data subline items needed clarification, it was then incumbent on Teledyne to clarify that aspect of its proposal.

Furthermore, the protester's allegation that by not advising the firm of the suspected mistake in its pricing proposals the agency violated section 15.607 of the FAR is without merit. When a mistake is suspected or alleged before award in a negotiated procurement, the FAR contemplates that the mistake will be resolved through clarifications or

discussions. See FAR §§ 15.607(a), 15.610(b)(4); Standard Manufacturing Co., 65 Comp. Gen. 451 (1986), 86-1 CPD ¶ 304 at 5. Here, as noted above, in the discussion questions directed to the protester, the agency pointed out the inconsistencies between the cost summary data on page 2 of its proposal and Section B and afforded the firm an opportunity to clear up the discrepancy and to submit a second BAFO. We think this discharged the contracting officer's obligation under the FAR.

Also without merit are several related contentions by Teledyne which are based on the premise that the agency knowingly evaluated its price proposal differently than it did the awardee's. These contentions are that the agency evaluated the second BAFOs received from UMC and Teledyne unequally because UMC's price proposal included the price for technical data once, whereas, Teledyne's included the price for technical data twice; that the contracting officer had notice of the firm's pricing pattern and he therefore knew or should have known that the hardware unit prices in its second BAFO included the prices for technical data; and that the contracting officer's decision to "ignore" this pricing history during the evaluation of Teledyne's second BAFO was arbitrary and capricious.

The NRCC denies that the contracting officer was on notice that the hardware unit prices in Teledyne's second BAFO included the price of the technical data. The agency asserts that it reasonably concluded that the protester's second BAFO -- submitted at the end of a second round of discussions during which the firm was asked to clarify its pricing pattern with respect to the technical data -- had been revised so as to eliminate the identified inconsistencies in its proposals. To that end, the agency notes that the protester's second BAFO did not contain a cost summary, as had been previously furnished on page 2 of Teledyne's first BAFO; nor was there any other indication that all items were not separately priced. Under these circumstances, the agency accepted the protester's representations in its transmittal letter of September 22 that "the inconsistencies between cost summary data and Schedule B of the solicitation" were resolved.

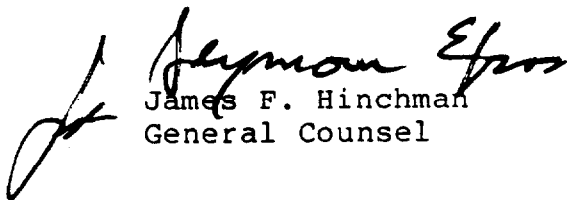
In extensive comments on the agency's report, Teledyne takes issue with the agency's conclusion that the second BAFO did not evidence the identical pricing pattern as all previous submissions -- that the technical data price was included in its hardware prices. As support for this argument, Teledyne relies on the three proposal submissions previously furnished to the agency and its computer generated pricing data attached to Standard Form DD 1411, the contract pricing proposal cover sheet. Therefore, Teledyne argues, the award

to a higher priced offeror, with knowledge of the existence of a lower priced proposal, was improper and represents an abuse of discretion.

The record does not support the protester's position. The solicitation made clear that a single award would be made to that firm whose "total offer on all items" is the most advantageous to the government. To the extent that Teledyne objects to the solicitation's failure to describe how the total offer would be computed, i.e., that the sum of all technical data subline prices would be added to the sum of all hardware unit prices, that issue is untimely raised. This issue was apparent on the face of the solicitation and had to be protested by the closing date for receipt of proposals. 4 C.F.R. § 21.2 (a)(1) (1987).

In any event, the protester was specifically advised that its manner of pricing could result in a "double charge" for certain subline data items. We believe, therefore, that Teledyne knew or should have known that the technical data prices would be added to the hardware prices; if it did not, then it was incumbent upon the firm to have inquired -- during the two rounds of discussions -- the basis for the contract negotiator's belief that its pricing pattern might result in a double charge for certain items. Moreover, when evaluating BAFOs, the contracting officer must evaluate the offer as finally submitted; it is inappropriate to evaluate or consider interim offers. We have examined Teledyne's second BAFO on the rotary design converter and seen no evidence that technical data subline prices were included in the hardware unit prices. Under these circumstances, we find the agency's conclusion that Teledyne had revised its second BAFO with respect to the pricing of technical data subline items to be reasonable, and we conclude that the NRCC's evaluation of Teledyne's second BAFO was proper.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel